the goods before giving the receipt, to determine their condition: *Skinner* v. *Chicago and Rock Island Railroad Co.*, 12 Iowa Rep. 191. This seems to be the only just rule in regard to the subject. But we apprehend the practice has been different, to some extent: express companies, requiring the name of the consignee upon their delivery books, which amounts to a receipt for delivery, which presumptively means in good condition; but, at the same time, refusing time or opportunity for examination. We are sure this practice prevails to some extent, but we believe, without any just foundation.

There are many other points we would be glad to examine, but we have no space. Our readers will find a valuable case, upon this subject, in another place in this number. I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Court of California.

GEORGE F. HOOPER *v.* WELLS, FARGO & CO.

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different.

The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted.

Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees.

Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier.

If a common carrier, who undertakes to transport goods, for hire, from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employees of the steamboat are, in legal contem-

plation, for the purposes of the transportation of such goods, the managers and employees of the carrier.

A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms.

Under our Practice Act a complaint cannot be amended in this court so as to make it correspond with the verdict. The District Court, in a proper case, before judgment, may direct the complaint to be so amended.

The opinion of the court was delivered by

SAWYER, J.—This is an action to recover the sum of $10,755, the value of a package of gold bullion delivered to defendants, at Los Angeles, to be transported to San Francisco, and which was lost in consequence of the explosion of the boiler of the steam-tug Ada Hancock, while being transported in charge of defendants' messenger from the shore, at San Pedro, to the anchorage of the steamer Senator.

The plaintiff, to maintain the action on his part, proved that "the defendants were, and are a company engaged in the public express business; that is to say, in receiving, forwarding, carrying, and delivering, by sea or by land, for any one who employs them, treasure, goods, and packages for hire, from place to place, within and without this state, in care of their own messengers, in vessels, and conveyances, and steamers, and boats, and vehicles, owned by others, and ordinarily used by the public at large, as the common and public mode of transportation and conveyance.

"That said defendants had an agency and an agent at Los Angeles for the purposes of their said public express business; their principal office and agency for the state of California being at San Francisco.

"That the usual modes of public conveyance and transportation between Los Angeles and San Francisco were, at the time hereinafter mentioned, and for a long time prior thereto, by a line of stage-coaches the whole way, and also by stage-coach from Los Angeles to San Pedro, and from San Pedro to San Francisco by a steamer called the Senator; that an agent of the defendant always travelled on said steamer Senator, between San Francisco and San Pedro, who, on arriving at San Pedro, proceeded to Los Angeles by stage-coach, and there received from the Los Angeles agent all express matter that had been left there to be

forwarded, carried, and delivered, returned with such express matter to San Pedro in time for the steamer Senator's return voyage, placed and shipped the express matter on board of such steamer, and returned on the steamer with the express matter in his charge to San Francisco, where it was in the first instance delivered at the general agency, and then delivered by such agency to the consignees or owners.

"That it was usual and customary for the steamer Senator, and all other coast steamers, on arriving at or approaching San Pedro, to anchor some three miles from shore, there not being sufficient depth of water to enable such vessels to approach the shore. That the usual means and mode of transporting goods and passengers between the shore and steamer was by steam-tug and lighters.

"That one of such usual and ordinary means was by a steam tug-boat of about forty-two tons burthen, called the Ada Hancock; that is, it was usual and customary for the defendants' messenger to go from the shore to the steamer with the express treasure in charge on said tug-boat, the heavier express freight being usually transported on lighters. That the express company was charged by the steamer the usual price for the passage of the express messenger and freight for all express goods, except treasure, which was carried in an iron box called the treasure-box, and was kept in the special charge of the messenger while on board the steamer, and no charge made by the steamer for its transportation.

"That as to any and all treasure transported by defendants upon said steam-tug Ada Hancock, or upon said steamer Senator, no bill of lading was ever given, and no written contract of affreightment was ever made therefor, neither was any note or memorandum in writing of the true character or value thereof ever given by the defendants, or by their agents or servants, to the master, or officers, or agent, or owner of said steam-tug, or said steamer Senator. That no freight was ever paid by or charged against defendants or their agents for treasure laden by them on board said steam-tug to or from said steamer Senator. That the defendants used the usual means of public transportation in conducting their business, which was notorious, and known to the plaintiff at the time hereinafter stated.

"That on the 21st day of April 1863, the plaintiff delivered at

the city of Los Angeles, California, to the agent of the defendants at Los Angeles, a package of gold bullion of the value of $10,755, to be transported to San Francisco in consideration of the sum of $80.65, then and there agreed to be paid to defendants by plaintiff, and on such delivery received and accepted from said agent a paper, partly printed and partly written, of which the following is a copy, the portion thereof italicised being written, and the portion thereof not italicised being printed, namely:

"'WELLS, FARGO & CO.'S EXPRESS.

"'Wells, Fargo & Co.,

"'Express,

"'Los Angeles.

"'Value, $10,755. April 21, 1863.

"'Received of *George F. Hooper*, *Dust and bullion*. Package, *value ten thousand seven hundred and fifty-five dollars*.

"'Address, *Geo. F. Hooper*, which we agree to forward to *San Francisco*, and deliver to *address*.

"'In no event to be liable beyond our route as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, &c., unless specially insured by them, and so specified on this receipt. For the proprietors,

"'P. BANNING, Agent.

"'Charges Col., $80.65. Per SANFORD.'

"Said package of gold bullion of the value of ten thousand seven hundred and fifty-five dollars has never been delivered by defendants to plaintiff, or to his address."

Defendants' agent, at Los Angeles, delivered said bullion to one Ritchie, the messenger, or travelling agent of defendants between Los Angeles and San Francisco, who took charge of the same and transported it to San Pedro by public stage-coach. For the purpose of placing said bullion and other treasure on board the steamer Senator, which then lay at anchor, as usual, off the shore, for transportation to San Francisco, said Ritchie placed it on board the steam-tug Ada Hancock, himself accompanying the bullion and having it in charge. Soon after, said steam-tug having on board said bullion, said Ritchie and several

other passengers for San Francisco started from the wharf for the purpose of placing said passengers, bullion, &c., on board said steamer Senator. Before reaching the anchorage of the Senator, the boiler of said steam-tug exploded, whereby the said Ritchie and several other passengers were killed, and said bullion lost. There was evidence tending to prove, that the explosion was caused by the carelessness of the engineer and other officers of the said steam-tug. Defendants had no interest in said steam-tug and no control over her management or navigation. The agents of defendants at Los Angeles had no authority to insure said bullion. The plaintiff had no option as to insuring, or not insuring the same with defendants at Los Angeles. Insurance could only be effected thereon with said defendants at their office in San Francisco.

The court gave the jury the following instructions:—

"First. That if defendants be an express company, publicly engaged in transporting freight from one place to another, for hire, they are common carriers, and subject to all the responsibilities of common carriers, except so far as they have modified them by agreement.

"Second. That the mere fact that an express company use their own vessels and steamers, or the vessels or steamers of others, in no way affects their liabilities as common carriers.

"Third. That if Wells, Fargo & Co. shipped the treasure in question on board the steamer Ada Hancock, and there was an explosion of said steamer, by which the treasure was lost, and that explosion was occasioned by the negligence of the parties in charge of the Ada Hancock, then Wells, Fargo & Co. are liable for the value of said treasure.

"Fourth. An express company which is in the habit of carrying, for hire, packages containing coin, dust, and other articles of value, from one place to another, is a common carrier.

"Fifth. Express companies which carry packages over routes where they employ other vehicles or means of conveyance than their own, are common carriers.

"Sixth. They may, however, by contract, limit their liability as common carriers, and if you find by the evidence that the defendants in this case did so limit their liability to the plaintiff, then the court charges you that such limit of responsibility must

govern; but that does not relieve defendants from ordinary care in the discharge of their duties.

"Seventh. The special agreement r ceived in evidence cannot exempt defendants from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used to effect the transportation.

"Eighth. If you find, from the evidence, that defendants undertook to forward the gold dust in question from Los Angeles, and deliver the same to plaintiff, at San Francisco, under a special agreement limiting the liability, defendants must be deemed to have undertaken the same degree of responsibility as that which attached to a private person, and were, therefore, bound to use ordinary care in the custody of the gold-dust, and its delivery, and to provide proper means of conveyance for its transportation.

* * * * * * * * * *

"Tenth. Should you find that the defendants shipped the treasure on board the steamer Ada Hancock, and there was an explosion of said steamer by which the treasure was lost, and that the explosion was occasioned by the negligence of the persons in charge of her, then defendants are liable for the value of the said treasure, by reason that they are responsible for injuries caused by the negligence of the agencies they employ in fulfilling the obligations of their undertaking."

The court also refused the following instruction asked on the part of defendants, to which refusal defendants excepted:—

"That if the defendants, by their agents, selected the steam-tug Ada Hancock for transportation of the treasure from the wharf to the Senator, and the jury find that at the time of such selection and of placing the treasure on board, the said tug was sufficient for the purpose of such contemplated transportation, then that the defendants are not responsible if the treasure was lost by any subsequent carelessness of the officers of the boat."

It is admitted by appellants' counsel that defendants, as to the transportation of said bullion, were acting in the capacity of common carriers; and such was undoubtedly their legal relation to said bullion at the time of its loss. It is further admitted—and this proposition also admits of little doubt—that defendants, under the law applicable to common carriers, are liable for its loss, unless such liability is restricted by the express stipulations

of the contract between the parties for the conveyance of said bullion.

It is insisted, however, on the part of defendants, that the contract contains express stipulations which exonerate them from all liability for the loss under the circumstances disclosed by the record; while on the part of plaintiff, this proposition is controverted. If mistaken on this point, it is further claimed by the plaintiff, that any stipulation in a contract which purports to exonerate a common carrier from loss resulting from the carelessness, negligence, or misfeasance of the carrier, or of his servants or agents, is contrary to the policy of the law and void. It is not pretended—and it could not with any show of reason be pretended—that the loss in question is within the meaning of the last clause of the receipt set out in the record relating to the dangers of navigation, &c. The clause relied on by defendants to relieve themselves from responsibility is as follows: "It is further agreed, and it is a part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders."

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. "The common carrier who undertakes to carry goods for hire is bound to deliver them at all events, unless injured or destroyed by the act of God, or the king's enemies:" Edw. on Bailment 295. "A common carrier is regarded by the law as an insurer of the property intrusted to him; or, in other words, he is legally responsible for acts against which he could not provide, from whatever cause arising, the acts of God and the public enemy only excepted: Angell on Carriers, § 67. There are many accidents against which common carriers cannot protect themselves by the exercise of the utmost care and skill on the part of themselves and their employees, for the result of which they are nevertheless responsible: Edw. on Bail. 454, *et seq.*, and Angell on Carriers, ch. 11, and cases cited. But the liability of "forwarders" is like that of warehousemen and common agents, and is governed by the general rule applicable to other bailees for hire not subject to extraordinary liabilities. They are responsible for ordinary care, skill, and diligence; that is, such care and diligence as prudent men in similar circumstances usually exercise in the management of their own business: Story on Bail. § 444. They are not, it is

true, insurers like common carriers, but they are responsible for all injuries to property while in their charge resulting from negligence or misfeasance of themselves, their agents or employees. In view of these principles governing the liabilities of "carriers" and "forwarders," what is the effect of the disputed clause in the contract under consideration upon the rights of the parties, plaintiff and defendants? What is the extent of the restriction upon the common law liabilities of the defendants? The language must be taken most strongly against the defendants: Edw. on Bail. 492. The instrument is executed by them alone. It was drawn up with care, in language selected by themselves, the blank form having been printed in advance ready to be presented to all persons offering property for transportation by their express. The restrictions were for their benefit. The owners of packages sent by express rarely examine with care, or indeed have an opportunity to critically consider, the terms of the receipt presented to them; and general terms, under such circumstances, are apt to mislead. These are some of the reasons for the rule given in the books. In construing a covenant in a charter-party, Mr. Justice CURTIS said: "The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. * * * These words of exception being introduced by the covenantor for his own benefit, if they are capable of bearing a more or less extended meaning, the rule requires that meaning to be allowed to them which is least beneficial to the covenantor: *Avery* v. *Merrill*, 2 Curtis 11. And Mr. Chief Justice GIBSON, in *Attwood* v. *Reliance Transportation Company*, 9 Watts 88, in relation to a restriction in a contract by a carrier, said: "Though it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them." And such is the well-settled rule of construction in such cases.

The contract of defendants is not merely to forward the bullion, but to "forward to San Francisco *and deliver to address.*" They are not merely to start it upon the way by some suitable conveyance, but are to see that it reaches its destination, and are to "deliver to address." They were undoubtedly common carriers, and not forwarders in the technical sense of the term. But

there was an evident intention on the part of defendants to restrict their liability, and, although they were acting in the capacity of carriers, they stipulated that they were "not to be responsible except as forwarders." As we construe this clause, it does not mean that defendants would start the package upon the way by some suitable conveyance, and that thereupon their responsibility should cease, for that would be directly in conflict with the covenant to "deliver to address." It simply means that defendants would not assume the extraordinary responsibilities of a common carrier, and become an insurer of the goods, except as against loss resulting from the act of God or public enemies. There is no express covenant or exception against loss by negligence on the part of defendants, or of those employed by them in the transportation of their express matter. The exception fixes the limit of responsibility by referring to another class of bailees, whose responsibilities are different from those of carriers; and the meaning, as we construe the restrictive clause, is, that they will be governed in respect to their liabilities by the same principles as those applicable to forwarders. It is manifest that it was not intended by this clause that all responsibility should cease as soon as the package was started upon its passage from the office of defendants at Los Angeles; for the receipt also contains the clause: "In no event to be liable beyond our route as herein receipted." The route as therein receipted extended to San Francisco. The printed form of the instrument used in this case was evidently framed with a view to general use, where the point of destination was beyond as well as within the routes established and used by defendants. Evidently it was contemplated that defendants might be liable for a loss occurring on their "route." If it was intended to release themselves from all responsibility while the package should be in transit, this clause would doubtless have been made to read: "In no event to be liable for any loss arising after leaving our office at Los Angeles," or some other language of equivalent import. The defendants were carriers, and the bullion was lost while in their possession in the character of carriers. It was not received to be stored, or to be started upon its passage merely by the first convenient opportunity; but to be carried and delivered "to address," and for no other purpose. There was no point at which defendants were in fact mere forwarders, in the technical sense of the term, or in

which they were warehousemen. The goods were never in their possession in such character, but in the character of carriers only. They could not be liable in a character which they never occupied; and their contract that while they are carriers they shall only be liable "as forwarders," in connection with the other language of the instrument, can only mean that the liability shall be governed by the principles of law applicable to forwarders; that is, that they shall only be liable for losses arising from a want of ordinary care on the part of themselves, and in the agencies made use of by them in the exercise of their ordinary business of carriers.

The word "as," is defined in the last edition of Webster's Dictionary as follows: "Like; similar to; of the same kind, or in the same manner; in the manner in which." And this is obviously the ordinary import of the word standing in relations similar to that in the instrument under consideration. Defendant's liability was to be "similar to" that of forwarders—"of the same kind." They were to be liable "in the same manner"—"in the manner in which"—forwarders are liable. In what manner are forwarders responsible? Of what kind is their liability? They are not insurers, like carriers, but they are liable for losses of goods while in their custody resulting from negligence of themselves and those whom they employ in their business of forwarders. And if a forwarder, or warehouseman, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum paid to the owner, use in his business the warehouse of another person, who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control. If the liability of these defendants under their contract is to be "similar to" that of forwarders—if it is of "the same kind"—if they are to be responsible "in the same manner," then they are liable for any loss resulting from the negligence of themselves, or negligence in the agencies employed by them, while the bullion was in their custody and control; and that custody, without doubt, continued up to the moment of the loss, and would have continued but for the loss up to the time when it would have reached its destination, and been delivered "to address." The fact that defendants made use of various public conveyances, their messenger with the treasure travelling

a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes the managers of those various conveyances were their agents and employees. Defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault. The defendants, although employing public conveyances, were still carriers having the actual custody and management of the treasure during the transit, as well as while it remained at the office of defendants at the extremities of their route. Ritchie, the messenger of the defendants, was in the actual custody of the treasure during the transit. Suppose, by the carelessness of Ritchie in transferring the treasure from the steam-tug to the Senator, it had been dropped into the ocean and lost, can it be pretended that the defendants would have been exempt from liability under the restrictive clause of their contract under consideration? Would it be claimed, in such case, that the liability of defendants ceased as soon as the treasure left their office at Los Angeles? We do not think any such construction would be claimed for the stipulation. If the defendants would not be protected by the exception against loss from the negligence of one of their servants, why should it protect them against the negligence of another, who as to the same matter is in law their servant or agent? Both are, in contemplation of law, the agents or employees of defendants, and the acts of both are the acts of defendants, and the language of the restrictive clause under consideration no more excludes the liability resulting from the negligence of one than from that of the other.

The defendants were common carriers, but under the contract they were carriers with limited responsibilities. There is an ample margin for the operation of the clause restricting the defendants' liability in the numerous accidents and losses not arising out of negligence, or malfeasance, and not even comprehended in the exception, "damages arising from the dangers of railroad, ocean, or river navigation, fire," &c., against which the carrier is an insurer, and from which forwarders are exempt.

Much stronger language has been held not to exempt bailees from losses arising from negligence. To justify the conclusion that such exemption is contemplated, the language should be

unequivocal, and susceptible of no other reasonable interpretation. In *Wells et al.* v. *Steam Navigation Company*, 8 N. Y. (4 Seld.) 375, the contract for towing a vessel from New York to Albany contained the clause "at the risk of the master and owners thereof." Although persons engaged in towing vessels have, in New York, been held not to be common carriers, the defendants in that case were still held to be liable for damages resulting from the carelessness of those engaged in towing the vessel, notwithstanding this restriction in their contract. Mr. Justice MASON said: "I cannot think the expression contained in it, 'at the risk of the master and owners thereof,' was understood by the parties as a protection against all kinds of negligence. It would be an extraordinary contract, which should in express terms give such a latitude in performing a kind of service of so important a character as the one under consideration; and to permit a contract to have so unreasonable an effect as it would imply, the intention of the parties should be clearly and unequivocally expressed, so as to leave no room for doubt or misconstruction: 6 John. 180; 7 Hill 547. In this contract nothing is said about negligence." (Page 379.) In the same case Mr. Justice GARDINER, referring to *Alexander* v. *Green*, 7 Hill 544, said (page 382): "We held then if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility, on account of the gross negligence of himself and servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to the general custom and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given"—and that he saw no reason now for changing this rule. So also in *Schieffelin* v. *Harvey*, where goods shipped to England were "returned to the shippers at their own risk," and were purloined from the ship, the owner of the ship was held liable. The Court say: "It is undoubtedly true that the general operation of law may be controlled by the agreement of the parties. But such agreement ought to be clear, and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both the parties: 6 John. 180. A similar rule is stated in *Buckman* v. *Shouse*, 5 Rawle 189. As further instances of the application of the rule to restrictive clauses in the contracts of carriers, see *Sager* v. *P. S.*

& P. E. Railroad Co., 31 Maine 238, 239; *De Rothschild* v. *Royal Mail Steam Packet Co.*, 7 Exch. R. 734. So also in the case of *The New Jersey Steam Navigation Co.* v. *Merchants' Bank*, in the Supreme Court of the United States, 6 How. 344. The contract provided that "the following conditions are stipulated and agreed to as part of this contract, to wit: the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any or every description, to be conveyed or transported by him in said crate or otherwise, in any manner, in the boats of the said company. Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:—

"'Take Notice—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time.'"

Mr. Justice NELSON, in construing this contract, says (p. 383): "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

To apply these principles to the case in hand, we think it cannot be said that the contract in question in clear and unequivocal

terms necessarily evinces an intention on the part of both parties, or of either party, that defendants shall be exonerated from any loss resulting from negligence in the agencies employed by them in the transportation of treasure committed to their care. If such had been the intention, it certainly could, and doubtless would, have been expressed in language about which there could be no misapprehension by either party. Nothing is said about negligence. The language used is not such as necessarily expresses, or as men would ordinarily employ to express the idea now claimed for it, and if so used, it would be likely to mislead a party to whom it is tendered ready executed upon the receipt of his property for transportation. That plaintiff could not have understood the contract in the sense claimed for it by the defendants, seems in the highest degree probable, for it can scarcely be credited, that a man of ordinary capacity and intelligence would commit so valuable a package to others to be transported a long distance, without supposing that somebody would be responsible to him for at least good faith, and ordinary care during the transit. But if the construction claimed for the stipulation in question is to prevail, the defendants were neither responsible themselves for ordinary care, after the treasure left their office at Los Angeles, nor bound to take the measures prescribed by the statute to make the owners of the vessels used by them as a means of transportation, responsible.

The language of the stipulation under consideration, at least, admits of the construction which we have given it; and to hold that the exception includes losses arising from negligence would, in our judgment, be to adopt a strained construction in favor of defendants, and to depart from its obvious import, while, as we have seen the rule to be, the construction must be most strictly against the defendants.

Holding, as we do, that the exception in the contract, for the reasons stated, does not exempt the defendants from losses resulting from the negligence of those in charge of the steam-tug, it becomes unnecessary to determine the more difficult question, in the present state of the authorities, as to the power of common carriers by special contract to exonerate themselves from liabilities arising from the negligence of those employed by them in their business of carriers.

The instructions of the court, considered in connection with the

instrument in evidence, are substantially in accordance with the views here expressed. We therefore find no error in them, or in refusing the instruction asked by defendants.

The damages alleged in the complaint are $10,755, and judgment is asked for that amount only. The verdict and judgment are for $11,740.87. This exceeds the amount embraced within the issues. There is no provision in our Practice Act authorizing this court to allow an amendment to the complaint making it correspond with the verdict. The court below, before judgment, might have permitted an amendment so as to make the complaint correspond with the verdict, but this was not done. Upon consent of the respondent the judgment may be so modified as to reduce the recovery to the amount claimed in the complaint.

Ordered, that respondent have fifteen days within which to file his consent in writing, that the judgment be modified so as to reduce the amount to the sum of $10,755, and upon filing such consent in writing the judgment will be modified in pursuance thereof. In default of filing such written consent, it is ordered that judgment be entered reversing the judgment of the District Court and granting a new trial.

It is further ordered, that appellants recover their costs of appeal.

The foregoing case we regard as one of great interest. The amount involved and the peculiar character of the case, would naturally have led to the most careful scrutiny, both of court and counsel; and we feel the utmost confidence in giving our full assent to each and all the propositions so carefully and so ably maintained by the learned judge.

1. The first question stated in the syllabus, which admits of any controversy, is that in regard to the restrictions contained in the carrier's receipt. The proposition that such restrictions are to be construed most strongly against the carrier, is only the common rule of construction in all analogous cases, that, in pleadings or contracts, the words, in a precise equipoise of intendment or import, shall be taken against the person using the words. We believe the decisions upon this point, stated in our leading article, *ante* p. 8, would have justified the learned judge in stating the proposition somewhat more strongly against the carrier. We understand the courts, as requiring satisfactory evidence, that the owner, at the time he left the goods for transportation, either did understand the nature of the conditions upon which the carrier claimed to accept them, or else, that he would have so understood them, but for his own want of ordinary care. *Ante*, pp. 7, 8.

2. The proposition that such a restrictive clause, to the extent that the express company are only to be responsible as "forwarders," could not be construed as exempting the carrier from responsibility for loss caused by the negligence of the employees on a steamboat, owned and controlled by other

parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of transportation; and that in such case the employees of the steamboat are, in legal contemplation, the servants of the carrier, seems not susceptible of much question. The clause of exemption from responsibility, that the carriers shall not be "responsible except as forwarders," in its precise terms does not seem to have any just application to that portion of the transportation which was performed under the express supervision of their own agent. It would seem to have been inserted with reference to such cases as required transportation beyond the defendant's line. They were certainly not "forwarders" upon their own route and while the goods were in charge of their own servants, as was the fact when the loss occurred in this case. We think, therefore, that the court might, with perfect propriety, have held that the words had no application to transportation upon their own line, and consequently did not touch the present case.

3. But if they were susceptible of the application given them by the court, in favor of the carrier, as intended to reduce his responsibility, as an insurer, to that of an ordinary agent, general or special, which seems to us a far too liberal construction of the carrier's own words, by which he now claims to secure his own exemption from the extreme common law responsibility, when other terms were far more natural and more effective for any such purpose; but, admitting this construction is allowable, still, we think, it cannot relieve the defendants, since it leaves them still responsible for ordinary care, diligence, and skill, in the conduct of the business of transportation. And this must extend, not only to themselves and their particular servants, but to all the agencies employed by them, both animate and inanimate. And although the owners might have looked directly to these servants of the carrier and brought their action against the steamboat company, as in the case of *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. U. S. Rep. 344;

4. Still they were not obliged to do so. This company were employed by the carriers, as their servants, and they are responsible for their faithfulness and good conduct, as such, and there is nothing in the contract to throw this upon the owner of the goods, or to shift his claim for indemnity upon them. It is at the election of the owners whether they will pass over their immediate employees and call upon the general carrier for indemnity. The English courts, as we have before shown, *ante*, p. 11, will not allow the owner of the goods to maintain an action against any carrier connected with the transportation, except those with whom his immediate contract is made. But the American rule gives the owner an election to call upon any one connected with the transportation, for indemnity, to the extent of the loss or damage sustained through his particular default: *ante*, pp. 11, 12. And we think this the more just and reasonable rule.

5. So that upon every ground it would seem, the owners of the goods might claim to recover, for a loss sustained through the want of ordinary care in those independent carriers employed by the express company with whom they contracted, since, if the restriction was not properly applicable to such independent carriers, they would be responsible to the full extent, as insurers, and the express company having assumed to overlook the transportation, personally, and to accept the whole price of transportation themselves, must be responsible to the owners, for all defaults of independent carriers employed by them, and will in turn have a remedy over against

such carriers. This may imply that the ultimate carriers will, in some cases, be liable to actions from more than one party for the same default. But this is true in all cases, where business is transacted through the agency of others. The action may always be brought in the name of the agent, in whose name the contract is made, or of the principal. And in the latter case the defendant will have the same right of set-off, and other defences, as if the suit were brought in the name of the agent with whom he contracted: *Lapham* v. *Green*, 9 Vt. Rep. 407. And if, on the other hand, the ultimate carriers are regarded as coming within the fair construction of the restrictive clause in the receipt, then it will not avail the defendants, for the reason that it cannot properly be so construed, as to cover defaults resulting from neglect of duty, in regard to proper care: *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, *supra*.

5. The same remark is true of the proposition, that a restrictive clause in the bill of lading or receipt, given by the carrier, will not be construed to exempt him from responsibility for loss occasioned by negligence in the agencies employed by him, unless such intention is very clearly expressed in such instrument; it comes short of the true rule of law upon the subject. The better opinion, we think, now is, that no person, natural or corporate, shall be allowed to stipulate for exemption from responsibility for his own negligence, because that removes one of the most direct and effective motives for faithful conduct, and such a contract would, therefore, be against sound policy: it is equivalent to allowing one to contract for license to do an immoral or an unlawful act. The license is void, and revocable at any time, and the promised reward being the price of an act *contra bonos mores*, is not enforceable in a court of justice: Redfield on Railways, § 133, p. 5: *McManus* v. *Lancashire Railway Co.*, 2 H. & N. 693; s. c., 4 Id. 327. In this latter hearing, before the Exchequer Chamber, the opinion of the Court of Exchequer was reversed, and all such contracts as professed to excuse the carrier for the neglect of duty by his servants, were held to be unreasonable and void under the English statute 17 & 18 Vict. ch. 31, s. 7. See also Redfield on Railways, § 133, notes 9–17, and §§ 134, 140, and notes, where these questions are very extensively considered. In conclusion, we must repeat, that we have been gratified with the careful and unexceptionable manner in which the principal case is studied and reasoned out, in all its bearings; and, although we have felt compelled to declare our opinion, that the propositions stated in the opinion of the court fall short of the ultimate truth upon those points, they clearly cover the case, and that is all the court could decide. We do not like to make invidious comparisons between the opinions of courts in different sections, but we must say, if lawyers look at the decisions beyond their own state, they should not overlook California. I. F. R.